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6 IN THE UNITED STATES DISTRICT COURT  
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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10 FETCH MEDIA, LTD.,

11 Plaintiff,

No. C 18-00015 WHA

12 v.

13 UBER TECHNOLOGIES, INC.,

14 Defendant.  
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**ORDER DENYING MOTION  
TO DISMISS AND GRANTING  
MOTION TO STAY**

16 **INTRODUCTION**

17 In this action seeking declaratory judgment relief, defendant moves to dismiss or, in the  
18 alternative, stay the action pending resolution of a parallel state court action. For the reasons  
19 set forth below, the motion to dismiss is **DENIED**, and the motion to stay is **GRANTED**.

20 **STATEMENT**

21 In 2015, defendant Uber Technologies, Inc., hired plaintiff Fetch Media, Ltd. to place  
22 mobile advertising for Uber with various third-party advertising suppliers. This campaign  
23 lasted until January 2017 when Uber, concerned over fraud by the third-party advertising  
24 suppliers, stopped paying and claimed that Fetch had a contractual duty to police and prevent  
25 such fraud.

26 After pressure from Fetch to pay the amounts owed, Uber sued Fetch in this district for  
27 breach of contract and other state law claims. Shortly thereafter, Phunware, Inc., one of the  
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1 advertising suppliers that Fetch had hired sued Uber in California Superior Court. Phunware  
2 alleged that Uber's withholding of payment to Fetch resulted in non-payment to Phunware.

3 Uber filed a cross-complaint against Phunware in state court. Because Uber had  
4 claimed Fetch's breach of contract and fraudulent conduct caused the non-payment to  
5 Phunware, Uber named Fetch as a third-party defendant. The cross-complaint asserted all the  
6 same claims against Fetch as it did in the federal action, as well as additional claims for  
7 conspiracy and intentional interference with a contract (Dkt. Nos. 20-2, 26-2).

8 Both cases proceeded in parallel until December 22, 2017, when Uber voluntarily  
9 dismissed its federal action.

10 On January 2, 2018, Fetch brought the instant action for declaratory relief. Fetch seeks  
11 determinations that (1) Fetch had no duty to police or prevent third-party suppliers' fraud, and  
12 (2) Uber had no basis for refusing to pay the amounts owed to Fetch and the third-party  
13 suppliers. Uber now moves to dismiss or, in the alternative, stay this action pending resolution  
14 of the state law action.\*

### 15 ANALYSIS

16 "Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed  
17 in a declaratory judgment suit where another suit is pending in a state court presenting the same  
18 issues, not governed by federal law, between the same parties." *Brillhart v. Excess Ins. Co.*,  
19 316 U.S. 491, 495 (1942). Under *Brillhart*, factors to be considered include avoiding  
20 duplicative litigation, avoiding needless determination of state law issues, and discouraging  
21 litigants from filing declaratory actions as a means of forum shopping. *Brillhart* remains the  
22 philosophic touchstone in our circuit, but these factors are not exhaustive. In *Dizol*, our court of  
23 appeals held that a district court may further consider:

24 whether the declaratory action will settle all aspects of the  
25 controversy; whether the declaratory action will serve a

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26 \* Fetch and Phunware also have a motion to stay pending in state court. Originally scheduled to be  
27 heard on February 7, Judge Harold Kahn of the San Francisco Superior Court continued the motion to give this  
28 Court the opportunity rule on the instant motion. For this Court's benefit, Judge Kahn indicated his tentative  
view is that the factors considered in *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.*, 15 Cal. App. 4th  
800 (1993), do not favor granting a stay of the state court action.

useful purpose in clarifying the legal relations at issue; whether the declaratory action is being sought merely for the purposes of procedural fencing or to obtain a ‘res judicata’ advantage; or whether the use of the declaratory action will result in entanglement between the federal and state court systems. In addition, the district court might also consider the convenience of the parties, and the availability and relative convenience of other remedies.

*Gov’t Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 n.5 (9th Cir. 1998). Here, the *Brillhart* and secondary *Dizol* factors favor staying the action.

**1. AVOIDING DUPLICATIVE LITIGATION.**

This declaratory relief action involves questions of fact and law identical to the state action. Uber’s state court complaint asserts that Fetch breached its contractual duty to police and prevent ad fraud. In the instant action, Fetch asserts that it had no such duty under that very contract. Both actions must necessarily determine the parties’ respective duties under the contract, and a declaration of those rights here would be duplicative of the state court action.

Fetch argues that there is no risk of duplicative litigation, but this argument is far-fetched. Each of the three district court decisions cited presented no overlap between the state and federal actions. Each involved an insurer in federal court seeking a declaration that they had no duty to cover claims against insureds brought by third-parties in state court. This case presents a starkly different scenario, where not only are the issues to be decided common to both actions, but the parties to the actions are identical as well.

Fetch seemingly acknowledges the fact that this action would result in duplicative litigation. In its brief, Fetch concedes that Uber asserted the same causes of action against Fetch in state court as Uber did in the federal action, actually referring to the cross-complaint as “duplicative.” Confusingly, Fetch also asserts that this declaratory action would not result in duplicative litigation *at the same time as they are asking for a stay of the state court action pending the outcome here* (Dkt. No. 26 at 9–10).

Because this action would create duplicative litigation, this factor heavily weighs in favor of abstention.

1           **2.       AVOIDING NEEDLESS DETERMINATION OF STATE LAW.**

2           The instant action presents no federal question and concerns only state contract law.  
3           Our court of appeals has held that when a declaratory judgment action involves only state law  
4           claims, and those claims are common to both the state and federal action, retaining jurisdiction  
5           would result in a needless determination of state law. *Smith v. Lenches*, 263 F.3d 972, 978  
6           (9th Cir. 2001).

7           Fetch claims that this factor weighs against abstention because the case does not involve  
8           unsettled or complex questions of state law. The state law issues may not be complex or novel,  
9           but a determination here would nonetheless be needless because they will be decided in state  
10          court.

11          This factor accordingly weighs in favor of abstention.

12           **3.       AVOIDING FORUM SHOPPING.**

13          Both sides vehemently accuse the other of forum shopping.

14          Our court of appeals has held that a declaratory judgment action brought against a party  
15          during the pendency of a non-removable state court action, presenting the same issues of state  
16          law, is an “archetype of what we have termed ‘reactive’ litigation.” *Cont’l Cas. Co. v. Robsac*  
17          *Indus.*, 947 F.2d 1367, 1372–73 (9th Cir. 1991). In *Robsac*, an insured (a California citizen)  
18          sued its insurer (an Illinois citizen) and other defendants (some of whom California citizens)  
19          in state court. Because the case could not be removed, the insurer filed a declaratory action in  
20          federal court seeking a declaration that it was not liable for any coverage under the policy.  
21          This, our court of appeals held, would encourage forum shopping in violation of the second  
22          *Brillhart* principle.

23          Fetch attempts the same here. Phunware (a citizen of Delaware and Texas) sued Uber  
24          (a citizen of Delaware and California), and Uber cross-complained against Fetch (a foreign  
25          citizen). Not being removable, Fetch seeks this declaratory action in an attempt to obtain a  
26          federal forum. This, like *Robsac*, is reactive and a violation of the second *Brillhart* principle.

27          Fetch, for its part, claims that Uber, after “seeing the writing on the wall in federal  
28          court,” engaged in forum shopping by voluntarily dismissing the first federal action in favor of

1 the state court action. The facts, however, present a more innocent story. Uber did not initiate  
2 the state court action. Phunware, a non-diverse party, sued Uber. Because the case presented  
3 issues involving the contract it had with Fetch, Uber added Fetch as a third-party defendant  
4 and asserted the same causes of action against Fetch as it did in the first federal action.  
5 Uber, apparently uninterested in litigating the same issue in two fora, voluntarily dismissed the  
6 less inclusive federal action. This was a reasonable response to avoid duplicative litigation and  
7 was not forum shopping.

8 This factor accordingly weighs in favor of abstention.

9 **4. OTHER *DIZOL* FACTORS.**

10 The principal factors having been discussed, this order turns to the secondary factors  
11 under *Dizol*.

12 *First*, with respect to whether the declaratory action will settle all aspects of the  
13 controversy, the state action encompasses more parties and more claims than the current action.  
14 A determination here would settle only a portion of the underlying controversy, and therefore  
15 result in piecemeal litigation and should be avoided.

16 *Second*, with respect to whether the declaratory action will serve a useful purpose in  
17 clarifying the legal relations at issue, although this action may clarify the legal relationship  
18 between the parties, any such determination would not add value because that relationship will  
19 be decided in the state court action.

20 *Third*, with respect to whether the declaratory action is being brought for the purposes  
21 of obtaining a res judicata advantage, no such advantage will flow from allowing either case to  
22 go first.

23 *Fourth*, with respect to whether the use of the declaratory action will result in  
24 entanglement between the federal and state court systems, there is no risk of inconsistent  
25 rulings, as one judge or the other will abstain.

26 *Fifth*, with respect to the availability and relative convenience of other remedies,  
27 California law does offer declaratory relief, and this option is available to Fetch in the state  
28 court.


1 On balance, considering the principles of judicial economy, comity, and federalism, this  
2 order determines that the *Brillhart* and *Dizol* factors weigh in favor of staying the action.

3 **CONCLUSION**

4 The motion to stay is therefore **GRANTED**. In fairness to Fetch, should the state court  
5 fail to resolve the Fetch part of the case, the motion to dismiss is **DENIED** — for the time being.  
6 A status conference is set for **DECEMBER 13, 2018, AT 11:00 A.M.** Please file a joint statement  
7 by December 6. The case management conference set for April 5 is hereby **VACATED**.

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9 **IT IS SO ORDERED.**

10 Dated: February 16, 2018.

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13 WILLIAM ALSUP  
14 UNITED STATES DISTRICT JUDGE  
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